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Supreme Court of the United States

ENVIRONMENTAL DEFENSE, *et al.*,

Petitioners,

v.

DUKE ENERGY CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

1. Whether the Clean Air Act's provision for expedited judicial review of "final action" promulgated by EPA, 42 U.S.C. § 7607(b), stripped the courts below of authority to consider a new interpretation of EPA's 1980 New Source Review rules that was developed and imposed in an enforcement action initiated in 1999; and

2. Whether EPA unlawfully interpreted its New Source Review rules to convert existing electric generating plants into "new sources," even though those plants had not undergone "modifications" as that term has been defined and used for decades under those rules and under the Act.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vii
INTRODUCTION	1
STATEMENT OF THE CASE	4
I. REGULATORY BACKGROUND	4
A. Existing Source Programs	4
B. "New Source" Programs	5
1. The NSPS Program Applies to Newly Constructed and "Modified" Emissions Sources	5
2. The Statutory PSD Program Did Not Change the Definition of "Modification"	6
a. NSPS "Modification" Was the Trigger for Pre-construction Permitting in the Pre-1977 Regulatory NSR Programs	6
b. Congress Enacted the NSPS "Modification" Concept into Statutory PSD	7
3. EPA's Post-1977 PSD Rules Required An NSPS "Modification" As The Trigger For A "Major Modification" Analysis	8
a. The 1978 Rules	8
b. The 1980 Rules	9
c. The *CMA* Rule Challenge	11
4. Implementation Of The PSD Program	11
a. EPA's Contemporaneous Interpretation of "Major Modification" Required a Threshold "Modification"	11

TABLE OF CONTENTS—continued

Page

b. Early Circuit Decisions Confirmed that an NSPS "Modification" Is a Precondition to PSD Applicability 12

c. In 1992 EPA Promulgated the Optional "WEPCo Rule" 14

5. The 1990 Amendments And EPA's Post-*WEPCo* Pronouncements Confirm The Established Definition Of "Modification" 14

II. EPA CHANGED ITS INTERPRETATION IN THE 1999 "ENFORCEMENT INITIATIVE" 16

A. EPA's Enforcement Position 16

B. The D.C. Circuit Did Not Address EPA's Enforcement Position In *New York I* 20

C. In October 2005, EPA Proposed A New Rule Abandoning Its Enforcement Position 21

SUMMARY OF ARGUMENT 22

ARGUMENT 25

I. THE COURTS BELOW HAD JURISDICTION TO CONSIDER EPA'S ENFORCEMENT INTERPRETATION. 25

A. Duke Does Not Challenge The Validity Of The 1980 Rules, It Challenges EPA's 1999 Interpretation. 25

B. Duke Could Not Have Raised Its Arguments In An Expedited Petition Under § 307(b)(1). 28

C. Insulating EPA's Position From Scrutiny Has No Basis In § 307(b) And Is Inconsistent With Fundamental Fairness. 29

TABLE OF CONTENTS—continued

Page

D. Petitioners' And The United States' Jurisdictional Argument Is Inseparable From Their Argument That The Courts Below Erred On The Merits 30

E. Duke's Challenge Was Not Raised By Others Following The Promulgation Of The 1980 Rules. 31

II. UNDER EPA'S RULES, A PROJECT IS A "MAJOR MODIFICATION" ONLY IF IT FIRST IS A "MODIFICATION," WHICH REQUIRES AN INCREASE IN A UNIT'S EMISSIONS RATE. 33

A. The Plain Language Of The 1980 Rules Establishes An NSPS "Modification" As The Trigger For PSD "Major Modification" Review. 33

B. EPA's Contemporaneous Interpretation Of The Rules Was That An NSPS "Modification" Is The Trigger For PSD "Major Modification" Review. 36

C. Petitioners' And The United States' Regulatory Arguments Are Incomplete And Incorrect. 37

III. EPA'S ENFORCEMENT INTERPRETATION IS INCONSISTENT WITH THE ACT 41

A. Congress's Express Incorporation Of The NSPS Definition Into PSD Means That A PSD "Modification" Requires An NSPS "Modification." 42

TABLE OF CONTENTS—continued

Page

B. The Structure And Context Of The CAA Confirm That A PSD "Modification" Requires An NSPS "Modification." 44

C. The "Purposes" Of PSD And NSPS Do Not Support EPA's Enforcement Interpretation..... 47

CONCLUSION..... 50

TABLE OF AUTHORITIES

CASES Page

Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967) 29
Adamo Wrecking Co. v. *United States*, 434 U.S. 275 (1978) 29
Alabama Power Co. v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979) ..... *passim*
Alaska Dep't Envtl. Conserv. v. *EPA*, 540 U.S. 461 (2004) 4, 7
Alaska Prof'l Hunters Ass'n v. *FAA*, 177 F.3d 1030 (D.C. Cir. 1999) 37
Bragdon v. *Abbott*, 524 U.S. 624 (1998) 44
In re Cassidy, 892 F.2d 637 (7th Cir. 1990) 14
Chisom v. *Roemer*, 501 U.S. 380 (1991) 45, 46
Christensen v. *Harris County*, 529 U.S. 576 (2000) 39
Clean Air Implementation Project v. *EPA*, 150 F.3d 1200 (D.C. Cir. 1998) 29
Cleveland Elec. Illuminating Co. v. *EPA*, 572 F.2d 1150 (6th Cir. 1978) 5
Department of Commerce v. *United States House of Reps.*, 525 U.S. 316 (1999) 46
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 41, 45
Harrison v. *PPG Indus., Inc.*, 446 U.S. 578 (1980) 28
IBP, Inc. v. *Alvarez*, 126 S. Ct. 514 (2005) 24, 43
Lorillard v. *Pons*, 434 U.S. 575 (1978) 24, 44
Madison Gas & Elec. Co. v. *EPA*, 4 F.3d 529 (7th Cir. 1993) 27
Monsanto Co. v. *EPA*, 19 F.3d 1201 (7th Cir. 1994) 29
North Haven Bd. of Educ. v. *Bell*, 456 U.S. 512 (1982) 41
New York v. *EPA*, 413 F.3d 3 (D.C. Cir. 2005) ..... *passim*

TABLE OF AUTHORITIES—continued

Page

Northern Ind. Pub. Serv. Co. v. *Colorado Westmoreland, Inc.*, 667 F. Supp. 613 (N.D. Ind. 1987) 17

Northern Plains Res. Council v. *EPA*, 645 F.2d 1349 (9th Cir. 1981) 48

Ohio Dep't of Human Servs. v. *HHS*, 862 F.2d 1228 (6th Cir. 1988) 37

Potomac Elec. Power Co. v. *EPA*, 650 F.2d 509 (4th Cir. 1981) 48

PPG Indus. Inc. v. *Harrison*, 587 F.2d 237 (5th Cir. 1979), *rev'd on other grounds*, 446 U.S. 578 (1980) 28

Pension Benefit Guar. Corp. v. *LTV Corp*, 496 U.S. 633 (1990) 47

Puerto Rican Cement v. *EPA*, 889 F.2d 292 (1st Cir. 1989) 13, 14, 27

Robinson v. *Shell Oil Co.*, 519 U.S. 337 (1997) 47

Rodriguez v. *United States*, 480 U.S. 522 (1987) ... 48

Rowan Cos. v. *United States*, 452 U.S. 247 (1981) 43

Solid Waste Agency v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) 37, 47

Stinson v. *United States*, 508 U.S. 36 (1993) .. 24, 27, 42

Sullivan v. *Stroop*, 496 U.S. 478 (1990) 42

TVA v. *Whitman*, 336 F.3d 1236 (11th Cir. 2003) 20, 40

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 37

Toyota Motor Mfg., Ky., Inc. v. *Williams*, 534 U.S. 184 (2002) 44

Train v. *NRDC*, 421 U.S. 60 (1975) 5

United States v. *Alabama Power Co.*, 372 F. Supp. 2d 1283 (N.D. Ala. 2005) ..... *passim*

United States v. *American Elec. Power Serv. Co.*, 218 F. Supp. 2d 931 (S.D. Ohio 2002) 27

TABLE OF AUTHORITIES—continued

Page

United States v. *Cinergy Corp.*, 384 F. Supp. 2d 1272 (S.D. Ind. 2005), *aff'd*, 458 F.3d 705 (7th Cir. 2006) 27

United States v. *Cinergy Corp.*, 458 F.3d 705 (7th Cir. 2006) 19, 27, 49

United States v. *Ohio Edison Corp.*, 276 F. Supp. 2d 829 (S.D. Ohio 2003) 27, 40

Wisconsin Elec. Power Co. v. *Reilly*, 893 F.2d 901 (7th Cir. 1990) ..... *passim*

Zedner v. *United States*, 126 S. Ct. 1976 (2006) 14

STATUTES AND REGULATIONS

15 U.S.C. § 57a(e)(1)(A) 30

15 U.S.C. § 2060(a) 30

16 U.S.C. § 825l(b) 30

33 U.S.C. § 1369(b) 30

42 U.S.C. § 7409 4

§ 7410 5

§ 7410 (1971) 5

§ 7411 5

§ 7412 43

§ 7470 48

§ 7475(a) 7, 42

§ 7478 44

§ 7479 ..... *passim*

§ 7491 47

§ 7492 47

§ 7501(4) 42, 45

§ 7607(b) 22, 26, 27, 30

§§ 7651-7651o 16

47 U.S.C. § 402(a) 30

N.C. Gen. Stat. § 62-2 ..... 12, 17

S.C. Code Ann. § 58-27-1510 ..... 12, 17

TABLE OF AUTHORITIES—continued

	Page
40 C.F.R. § 51.24 (1987)	10
§ 51.100 (1987)	2, 10, 23, 28, 34
§ 51.166 (1987)	*passim*
§ 51.166(b)(21)(v) (1993)	14, 41
§ 51.166(a)(7)(iv)(c) (2005)	20, 41
§ 52.01(d) (1975)	6
§ 52.01(d) (1987)	*passim*
§ 52.21 (1987)	2, 33
§ 52.1770 (1987)	10
§ 52.2120 (1987)	10
§ 60.2(h) (1972)	5
§ 60.2 (1987)	2
§ 60.14 (1987)	2, 6, 32
36 Fed. Reg. 24,876 (Dec. 23, 1971)	6
39 Fed. Reg. 36,946 (Oct. 15, 1974)	6, 20, 35
42,510 (Dec. 5, 1974)	6, 23, 34
40 Fed. Reg. 58,416 (Dec. 16, 1975)	6
41 Fed. Reg. 55,524 (Dec. 21, 1976)	7
43 Fed. Reg. 26,380 (June 19, 1978)	8, 10, 35
44 Fed. Reg. 51,924 (Sept. 5, 1979)	9
45 Fed. Reg. 52,676 (Aug. 7, 1980)	*passim*
47 Fed. Reg. 6017 (Feb. 10, 1982)	10
7836 (Feb. 23, 1982)	10
49 Fed. Reg. 43,211 (Oct. 26, 1984)	8, 35, 45
57 Fed. Reg. 32,314 (July 21, 1992)	14
61 Fed. Reg. 38,250 (July 23, 1996)	39
67 Fed. Reg. 80,186 (Dec. 31, 2002)	20
68 Fed. Reg. 61,248 (Oct. 27, 2003)	8, 35, 47
70 Fed. Reg. 25,162 (May 12, 2005)	47
61,081 (Oct. 20, 2005)	*passim*
S.C. Code Ann. Regs. 103-360	12, 17
61-62.5 (2001)	33

TABLE OF AUTHORITIES—continued

LEGISLATIVE HISTORY — Page

S. 52, 99th Cong. (1985) 15
S. 2200, 99th Cong. (1986) 15
S. 2203, 99th Cong. (1986) 15
S. 2813, 99th Cong. (1986) 15
S. 316, 100th Cong. (1987) 15
S. 321, 100th Cong. (1987) 15
S. 300, 100th Cong. (1987) 15
H.R. 4567, 99th Cong. (1986) 15
Clean Air Reauthorization (Pt. 2): Hearings before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce, 101st Cong. (1989) 16
S. Rep. No. 91-1196 (1970) 5
S. Rep. No. 101-228 (1989) 14
H.R. Rep. No. 95-294 (1977) 24, 46
H.R. Rep. No. 101-490, pt. 1 (1990) 16
123 Cong. Rec. 18,021 (1977) 46
26,841 (1977) 48
36,250 (1977) 8, 45

OTHER AUTHORITIES

E.P.A., *Basic Facts On CAIR*, *at* http://www.epa.gov/cair/basic.html (last visited Aug. 6, 2006) 47
E.P.A., *Fact Sheet - Final Amendments to the Regional Haze Rule and Guidelines for Best Available Retrofit Techonology (BART) Determinations, 2005*, *available at* http://www.epa.gov/visibility/fs_2005_6_15.html (last visited Aug. 6, 2006) 47
E.P.A., New Source Review (NSR), Policy & Guidance, *at* http://www.epa.gov/nsr/guidance.html 28

INTRODUCTION

The issue in this enforcement action is: When is an existing power plant transformed into a "new source" under the Clean Air Act ("CAA") and its implementing rules, requiring the plant to obtain a pre-construction permit and install "new source" emissions controls? Under the CAA and its rules, an existing source becomes a "new source" only when it undergoes a "modification." In 1977, Congress defined "modification" under New Source Review ("NSR") to be the same as the definition of "modification" under the pre-existing New Source Performance Standards ("NSPS"). See 42 U.S.C. § 7479(2)(C) ("The term 'construction' when used in connection with any source or facility, includes the modification (*as defined in section 7411(a) of this title*) of any source or facility.") (emphasis added). The Environmental Protection Agency ("EPA") promulgated its NSR rules in 1980 (the "1980 Rules") and originally interpreted them to mean exactly that. And the electric utility industry followed those rules for two decades. Nonetheless, in this enforcement action EPA retroactively announced a new and conflicting approach—suddenly contending that the entire industry had blatantly violated the rules for years.

EPA's enforcement approach is out of step with history and the basic statutory and regulatory framework. Congress used the term "modification" in all of the "new source" programs for good reason. Like NSPS, NSR requires new sources of pollution to engage in pre-construction review and install state-of-the-art pollution controls—a massive undertaking that EPA acknowledges would be "very costly and can present significant technical challenges" for existing facilities. 70 Fed. Reg. 61,081, 61,093 (Oct. 20, 2005). To ensure that NSR is triggered only when compliance with its requirements makes economic and practical sense and fits within the statutory scheme, Congress applied NSR only to "construction," which includes the building of new facilities and the "modification" of existing facilities. 42 U.S.C. § 7479(2)(C).

The term "modification" had a well-established meaning when the 1977 Amendments were enacted. And EPA carried that precise meaning forward in its rules. Under both NSPS and NSR, a project is a "modification" only if it causes an increase in a unit's basic emissions capacity (measured by its hourly emissions rate), effectively creating a "new," larger source of emissions. 40 C.F.R. §§ 51.100, 52.01(d), 60.14, & 60.2.[1] NSR then imposes more stringent requirements on certain "modifications," known as "major modifications." *Id.* §§ 51.166, 52.21. A "major modification" occurs if the project significantly increases total annual emissions at the overall source, calculated using representative hours of operation. *Id.* § 51.166(b)(2)-(3), (21).

In 1999, however, EPA launched its "unprecedented" NSR enforcement initiative, including this lawsuit against Duke Energy Corporation ("Duke"). See Press Release, U.S. D.O.J., *U.S. Sues Electric Utilities in Unprecedented Action to Enforce the Clean Air Act* (Nov. 3, 1999) (Duke Mot. Summ. J. Ex. 7). In this enforcement initiative, EPA attempted through litigation to force the electric utility industry to retrofit new-source controls on all coal-fired power plants—at a cost of billions of dollars and under the threat of billions more in civil penalties. To obtain this result, EPA reinterpreted the NSR rules to eliminate the well-established "modification" trigger. Instead, EPA contended that NSR could be triggered by commonplace projects that merely maintain a facility's operating capabilities and do not increase the facility's emissions rate.

This case involves 29 such projects, which Duke undertook as long ago as 1988 at eight different power plants in North and South Carolina. Contrary to the impression Petitioners attempt to foster, these plants are by no means unregulated, because "NSR is not the primary mechanism for reducing emissions from existing sources." *New York* v. *EPA*, 413 F.3d 3, 28 (D.C. Cir. 2005) ("*New York I*"). Other CAA re-

[1] Unless otherwise noted, all C.F.R. citations are to the 1987 edition.

quirements and state clean air laws set strict limits on the emissions of sulfur dioxide (SO_2), nitrogen oxides (NO_x) and particulate matter from each of these plants. For example, Duke's plants are subject to health-based emission limits set forth in their state operating permits. JA165. In addition, the plants are regulated under (1) the CAA's "Acid Rain" program, which requires existing plants to reduce their SO_2 and NO_x emissions; (2) the "NO_x SIP Call" and the "Clean Air Interstate Rule," which require utilities in the eastern States to achieve additional reductions in SO_2 and NO_x; and (3) North Carolina's Clean Smokestacks legislation, one of the nation's most stringent air emission control laws. JA166-67.

The projects EPA deemed to violate NSR involved the replacement and repair of corroded boiler components—principally steel tubes that carry water or steam. JA159-61. None of the projects violated any condition of Duke's operating permits. JA161. None increased any unit's capacity to emit pollutants. *Id.* Moreover, these projects were performed in full view and with the knowledge of EPA and the state authorities charged with enforcing the Act; but neither ever hinted that Duke's maintenance activities required "new source" permits. Nor, before the 1999 enforcement initiative, did any private party challenge any of these projects in any citizen suit. No one suggested that Duke's activities required NSR permits for a simple reason: EPA, the States, and the industry all understood and interpreted the rules to apply to existing emissions units only when those units underwent NSPS "modifications"—fundamentally changing the units' ability to emit pollutants.

EPA's enforcement position is particularly odd in light of the Agency's concession in a recent notice-and-comment rulemaking that its position "leads to outcomes that have not advanced the central policy of the major NSR program." 70 Fed. Reg. at 61,088. In that rulemaking, initiated in late 2005, EPA proposed a rule consistent with Duke's position here and the decisions below. *Id.* at 61,081. Even before that

proposal, EPA effectively had ended its enforcement initiative, stating that it would bring no new cases under its pre-2002 rules. See *United States* v. *Alabama Power Co.*, 372 F. Supp. 2d 1283, 1306 n.44 (N.D. Ala. 2005).[2]

In the end, Petitioners' and the United States' arguments do not withstand common-sense scrutiny. Under their view, the electric utility industry has engaged in decades-long, universal noncompliance—in plain view of and in complicity with state and federal regulators. The far more sensible conclusion is that EPA changed its interpretation of the statute and rules in this enforcement initiative—adopting an interpretation it now has disavowed as bad policy. Thus, this case is based on a made-for-litigation theory that is inconsistent with the language and history of the rules, EPA's historical interpretation of those rules, and EPA's current policy position. The Court should reject this litigation-based approach to regulation and affirm the judgment below.

STATEMENT OF THE CASE

I. REGULATORY BACKGROUND.

A. Existing Source Programs.

The 1970 Amendments established the basic framework of federal air pollution regulation. These Amendments directed EPA to develop National Ambient Air Quality Standards ("NAAQS"), which establish allowable ambient pollution levels to protect public health and welfare with an adequate margin of safety. See 42 U.S.C. § 7409; *Alaska Dep't Envtl. Conserv.* v. *EPA*, 540 U.S. 461, 469 (2004) ("*ADEC*").

"The provisions for the attainment and maintenance of NAAQS were to operate primarily through controls on existing sources of pollution," established in implementation plans developed and enforced by the States. *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 346 (D.C. Cir. 1979). These State Im-

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[2] Consistent with that position, the United States urged this Court to deny the petition for certiorari and allow EPA's policymaking process to continue. *See* U.S. Opp'n Pet. Cert. at 8-9.

plementation Plans ("SIPs") establish source-by-source emissions limits, see 42 U.S.C. § 7410; *Train* v. *NRDC*, 421 U.S. 60, 66-67 (1975), which are based on the assumption that existing sources "operate 24 hours a day at full capacity"—"every day of the year." *Cleveland Elec. Illuminating Co.* v. *EPA*, 572 F.2d 1150, 1160 (6th Cir. 1978).

B. "New Source" Programs.

1. The NSPS Program Applies to Newly Constructed and "Modified" Emissions Sources.

To assist States in meeting their ambient air quality standards, the 1970 Amendments directed EPA to issue NSPS, which are technology-based standards that regulate emissions from "new sources." 42 U.S.C. § 7411(b). In general, these controls are "more stringent than those needed to meet [the] NAAQS." *Alabama Power Co.*, 636 F.2d at 346. The Amendments also required pre-construction review of all "new sources" subject to NSPS. See 42 U.S.C. § 7410(a)(2)(D), (a)(4) (1971).

Congress chose not to apply NSPS to *existing* sources as a general matter, however, because of the high cost and difficulty of installing new control technology on such sources. See, *e.g.*, S. Rep. No. 91-1196, at 15-17 (1970). Instead, NSPS applied only to "new sources"—defined as newly-constructed units and "modification[s]" to existing units. 42 U.S.C. § 7411(a)(2). Thus, NSPS applies to existing sources only where a "modification" occurs—defined as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." *Id.* § 7411(a)(4).

For more than 30 years, "modifications" have included only activities that in essence create a "new source" by increasing a unit's actual emissions capabilities—as measured by the unit's hourly emissions rate, not by variations in hours of operation. The definition of "modification" promulgated in 1971 tracked the statutory definition almost verbatim. See 40

C.F.R. § 60.2(h) (1972). In addition, the rules specified that "increase[s] in hours of operation" and "increase[s] in the production rate ... [within a facility's] operating design capacity" are not modifications. 36 Fed. Reg. 24,876, 24,877 (Dec. 23, 1971). Thus, for existing units, an increase in the "amount" of emissions always has meant an increase in the unit's basic capacity to emit pollutants, resulting in a "new," larger emissions unit.

In 1975, EPA clarified that the phrase "increases the amount of any air pollutant" in the definition of "modification" means an increase "in the emission rate," measured "as kg/hr." 40 C.F.R. § 60.14(a)-(b); 40 Fed. Reg. 58,416, 58,416 (Dec. 16, 1975). This hourly rate assures that the rule "automatically allow[s] increases in operating hours as intended by [the operating hours exclusion in] 40 C.F.R. 60.2(h)." 39 Fed. Reg. 36,946, 36,947 (Oct. 15, 1974). In promulgating this rule, EPA "did not create a new definition of modification," but rather "define[d] how to determine an actual emissions increase." 70 Fed. Reg. at 61,096.

2. The Statutory PSD Program Did Not Change the Definition of "Modification."

a. *NSPS "Modification" Was the Trigger for Pre-construction Permitting in the Pre-1977 Regulatory NSR Programs.*

Before Congress enacted the NSR provisions at issue here—the "Prevention of Significant Deterioration" ("PSD") provisions—EPA had promulgated a regulatory PSD program. See *Alabama Power*, 636 F.2d at 346-49. These PSD rules regulated the "construction" of new sources and the "modification" of existing sources—defining those terms essentially the same as the existing NSPS rules 40 C.F.R. § 52.01(d) (1975). EPA also stated that the "general definition of modified source" in regulatory PSD was meant to be "consistent with the definition used in Part 60"—the NSPS program. 39 Fed. Reg. 42,510, 42,513 (Dec. 5, 1974).

EPA introduced the term "major modification" in a 1976 interpretive ruling. See 41 Fed. Reg. 55,524 (Dec. 21, 1976). This ruling imposed additional requirements on certain NSPS "modifications" in so-called "nonattainment" areas. These requirements applied only to those "modifications" that were "major" (or would have a greater air quality impact)—defined as "modifications" that increased annual emissions over a particular tons-per-year level. *Id.* at 55,528.

b. *Congress Enacted the NSPS "Modification" Concept into Statutory PSD.*

In 1977, Congress enacted the statutory PSD program. "The PSD requirements ... 'are designed to ensure that the air quality in attainment areas or areas that are already 'clean' will not degrade.'" *ADEC*, 540 U.S. at 470.

In enacting the 1977 Amendments, Congress codified many elements of the existing new source rules and "tightened" others. *Alabama Power*, 636 F.2d at 349-50; see also 45 Fed. Reg. 52,676, 52,679 (Aug. 7, 1980). The statutory PSD program expanded upon the pre-existing NSPS and regulatory PSD programs by extending "new source" coverage to additional source categories and pollutants. See *Alabama Power*, 636 F.2d at 350-51. Congress also tightened the regulatory PSD definition of Best Available Control Technology ("BACT"), to require control technology at least as stringent as the technology required under NSPS. See *ADEC*, 540 U.S. at 472-73; 42 U.S.C. § 7475(a)(4). And Congress imposed rigorous new permitting requirements—including extensive air quality modeling, a public hearing, and a public comment period. 42 U.S.C § 7475(a). "[A]n applicant sometimes must spend up to $500,000 on [this] permit process and ... for a complex project, the time for approval can take from five to seven years." *ADEC*, 540 U.S. at 516-17 (Kennedy, J. dissenting).

Because this pre-construction process cannot sensibly apply to ordinary maintenance projects at existing sources, Congress did *not* require EPA to change its definition of "modifi-

cation." Instead, Congress expressly incorporated the existing definition of "modification" into PSD. See 42 U.S.C. § 7479(2)(C).

In fact, as enacted the PSD provisions referred only to "construction"; they did not include the term "modification" at all. Three months after their enactment, Congress clarified in a "technical and conforming amendment" that the "construction" activity subject to PSD includes "modifications" as defined under NSPS. See 123 Cong. Rec. 36,250, 36,331 (Nov. 1, 1977) (capitalization omitted). It was "not the purpose of these amendments to re-open substantive issues in the [CAA]." *Id.* at 36,252. Instead, the amendments "defin[ed] 'construction' in [PSD] to conform to usage in other parts of the Act." *Id.* at 36,331. EPA has repeatedly acknowledged that this reference to "'usage in other parts of the Act' ... refers, not only to section 111(a)(4), but also to the EPA regulations implementing section 111 that were in effect at the time." 49 Fed. Reg. 43,211, 43,213 (Oct. 26, 1984); see also 43 Fed. Reg. 26,380, 26,394 (Jun. 19, 1978); 68 Fed. Reg. 61,248, 61,269 (Oct. 27, 2003).

3. EPA's Post-1977 PSD Rules Required An NSPS "Modification" As The Trigger For A "Major Modification" Analysis.

a. *The 1978 Rules.*

In 1978, EPA promulgated its first rules implementing the 1977 Amendments. See 43 Fed. Reg. 26,380 (June 19, 1978). Consistent with the Act, EPA applied PSD to the "'construction'" of new sources—which includes "modification[s]" to existing sources. *Id.* at 26,383. EPA did not create a new definition of "modification," however. Instead, consistent with PSD's focus on "'major emitting facilit[ies],'" 42 U.S.C. § 7479(1), the 1978 rules imposed PSD requirements only on a subset of NSPS "modifications": those that are "major." 43 Fed. Reg. at 26,382; see also *id.* at 26,385 (stating that SIPs "may provide that [such] requirements shall apply to a proposed source or modification only with respect to those pol-

lutants for which the proposed construction would be a major source or major modification"). EPA adopted the "major modification" standard to avoid imposing more stringent PSD requirements on NSPS "modifications" that, because of their size or other factors, would not cause significant changes in ambient air quality.

The 1978 rules defined "major modification" to require an increase in a unit's "potential" annual emissions rate—assuming that the unit operates 24 hours per day, 365 days per year before and after the project—by more than either 100 or 250 tons per year, depending on the type of source. See *Alabama Power*, 636 F.2d at 399. Because emissions thus were measured using constant pre- and post-project "potential" hours of operation, only NSPS "modifications" (activity that increased a unit's hourly emission rate, without regard to hours of operation) that was large enough to cause a "major" increase in annual emissions would trigger PSD.

Nearly all of the 1978 rules were challenged. However, no one challenged the requirement that an NSPS "modification" occur before a PSD "major modification" could occur. And, although the D.C. Circuit agreed that the PSD program should not "delay and impede industrial changes that Congress did not intend to regulate," the court rejected the 100/250 tpy threshold for "major modifications." *Id.* at 399-404. Instead, the court suggested other mechanisms—specifically, a source-wide emissions "netting" provision and a "*de minimis*" exception—to avoid applying PSD to "modifications" that would not significantly affect air quality. *Id.*

b. *The 1980 Rules.*

In 1979, EPA proposed revisions in response to *Alabama Power*. EPA left unchanged the definition of "modification" for individual units, but proposed that "major modifications" require "a significant net increase in [a source's] potential to emit." 44 Fed. Reg. 51,924, 51,952 (Sept. 5, 1979). This change replaced the 100/250 ton-per-year threshold with a lower "significance" test and a source-wide "netting" calcula-

tion. The "netting" provision limited "major modifications" to those "modifications" that would cause a source-wide "net emissions increase"—calculated using contemporaneous emissions increases and decreases at all units at the source (also known as the "bubble approach").

EPA issued its final PSD rules in 1980.[3] The 1980 Rules maintained the condition that a "modification" occur at a unit before a source-wide "major modification" analysis is required. See 40 C.F.R. §§ 51.100, 52.01(d). But the rules revised the method of determining whether a "modification ... qualifies as major." 45 Fed. Reg. at 52,677. Under the 1980 Rules, a "major modification" occurs only if a significant net increase in the source's "actual" emissions occurs. See 40 C.F.R. § 51.166(b)(2)(i), (3)(i), (21). The rules required "actual emissions" to be calculated using constant operating hours from a "representative" period before the change. See *id.* § 51.166(b)(21)(ii); *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901, 918 n.14 (7th Cir. 1990) ("*WEPCo*").

In the preamble, EPA explained that it "shifted the focus of its regulatory definitions from 'potential to emit' to 'actual emissions'" to address a "'paper offset'" problem associated with the netting of hypothetical ("potential") emissions. 45 Fed. Reg. at 52,700. This change in netting methodology neither repealed the requirement that only NSPS "modifications" trigger a "major modification" analysis, nor dramatically expanded the activities subject to PSD review. To the contrary, the rules specifically provided that the terms "physical [or operational] change" do not include an "increase in the hours

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[3] The PSD rules applicable here are those adopted in the North Carolina and South Carolina SIPs and approved by EPA. See 47 Fed. Reg. 7836 (Feb. 23, 1982); 40 C.F.R. § 52.1770 (North Carolina); 47 Fed. Reg. 6017 (Feb. 10, 1982); 40 C.F.R. § 52.2120 (South Carolina). These provisions follow the federal 1980 PSD rules, originally promulgated at 40 C.F.R. §§ 51.24 (rules for SIPs—recodified at 40 C.F.R. § 51.166 in 1987), and 52.21 (federal rules). These rules "are essentially identical, with the difference in reviewing agency, EPA as opposed to State, being the major distinction." 43 Fed. Reg. at 26,380.

of operation," 40 C.F.R. § 51.166(b)(2)(iii)(f), confirming that only new emissions capacity is treated as an emissions increase. In its economic impact analysis, EPA explained that the final rules' coverage was similar to that of the 1978 rules and the 1979 proposal. 45 Fed. Reg. at 52,729.

c. *The CMA Rule Challenge.*

Various parties challenged the 1980 Rules. Once again, no one challenged the rules' requirement that a "modification" occur before a "major modification" analysis is required. And, of course, no one contended that a "modification" *had* to occur for a "major modification" analysis to occur, because that was exactly what the 1980 Rules provided. The sole challenge to the "major modification" requirement was by General Motors ("GM") on the ground that the source-wide "netting" calculation used "actual" rather than "potential" emissions—a ground not joined by most industry petitioners. See Br. Industry Pets. on Actual Emissions Definition of Net Increase at 5, *Chemical Mfrs. Ass'n* v. *EPA*, No. 79-1112 (D.C. Cir. Feb. 12, 1981) ("This case seeks review of the manner in which EPA has chosen to implement the bubble approach ...."); *id.* at 25 (contending "no modification occurs" if source-wide "potential emissions" do not increase). Thus, the GM challenge to the "major modification" netting test had nothing to do with Duke's position here. The various challenges ultimately resulted in the "*CMA* settlement," and the case was administratively closed.

4. Implementation Of The PSD Program.

a. *EPA's Contemporaneous Interpretation of "Major Modification" Required a Threshold "Modification."*

Shortly after finalizing the 1980 Rules, EPA confirmed in two applicability determinations that only a "modification" as defined under NSPS triggers a PSD "major modification" analysis. In 1981, EPA explained that "PSD applicability is determined by evaluating any change in emissions rates caused by" the physical or operational change under review.

JA28 ("GE Determination"). Absent a change in the hourly emission rate, EPA concluded, actual emissions "could increase only if there is an increase in the production rate or hours of operation, both of which are specifically exempt from PSD review." *Id.* In a second determination, EPA stated that an increase in a unit's hours of operation enabled by a physical change did not trigger PSD. See JA35-37 ("Cargill Determination"). Thus, under EPA's contemporaneous interpretation of the 1980 Rules, a physical change that only increases an existing unit's hours of operation is not a "modification" and cannot be a "major modification."

b. *Early Circuit Decisions Confirmed that an NSPS "Modification" Is a Precondition to PSD Applicability.*

Throughout the 1980s, the electric utility industry continued to engage in and improve its maintenance and repair practices, to ensure that its generating units could be counted upon to operate reliably. Of course, maintaining an existing unit at its existing emissions rate does not trigger NSPS or PSD. Nor—contrary to Petitioners' apparent position, see Pet. Br. 6-7—does the CAA or any other statute require utilities to retire their units after a certain number of years of operation. Indeed, electric utilities are *required* to maintain and repair their units to meet their statutory duty to provide an efficient and reliable supply of electricity for the public. See, *e.g.*, N.C. Gen. Stat. § 62-2; S.C. Code Ann. § 58-27-1510; S.C. Code Ann. Regs. 103-360.

Before 1999, EPA's only attempt to apply PSD to a project at an existing electric utility involved a "highly unusual, if not unprecedented" "renovation" of five units at the Wisconsin Electric Power Company's ("WEPCo") Port Washington Plant, which had operated well below capacity for over 10 years. See JA249-50 (Clay Mem.). EPA determined that an NSPS "modification" would occur at three of the units—because the projects would increase the units' maximum achievable hourly emissions rates. EPA also determined that

a PSD "major modification" would occur at all five units. To reach that result, EPA applied a new and unusual interpretation of its 1980 Rules to the units that were not NSPS "modifications." Specifically, EPA claimed that a "'major modification'" could occur if a unit's post-project "'potential to emit'" would exceed its "actual emissions" before the project—the so-called "actual-to-potential" test. JA255-56.

WEPCo petitioned for review, and the Seventh Circuit reversed EPA's PSD determination on the merits. Noting that the 1980 Rules on their face apply the "potential to emit" concept only to a "unit which has not begun normal operations" 40 C.F.R. § 51.166(b)(21)(iv), the court described EPA's interpretation as "assum[ing] what it seeks to prove"—because, "in order to demonstrate that [WEPCo's] like-kind replacement project constitutes a modification, ... EPA *assumes* that the plant is a 'modified' unit." *WEPCo*, 893 F.2d at 917 (emphasis added). On remand, the court ordered EPA to determine "whether the renovated plant would cause a significant net emissions increase if it were operated under present hours and conditions"—assuming constant, representative annual operating hours and conditions. *Id.* at 918 n.14. "The practical effect [of the 'present hours and conditions' requirement] is that a net emissions increase can result only from an increase in the hourly rate of emissions," *Alabama Power*, 372 F. Supp. 2d at 1308—in other words, only if an NSPS "modification" first occurs. EPA and WEPCo ultimately settled.

In *Puerto Rican Cement Co.* v. *EPA*, the First Circuit upheld the application of PSD to a proposal "to build a new cement kiln, replacing older kilns" at a source. 889 F.2d 292, 293 (1st Cir. 1989) (Breyer, J.). The court found no anomaly in applying PSD to the installation of a "new" unit even though the company could have "increase[d] production at its old kilns to 100 percent of capacity, thereby vastly increasing actual emissions" without triggering PSD. *Id.* at 298. According to the court, the reason for this distinction "lies in the

statute itself, for the statute refers to the '*construction*' of facilities, not to *increased use of existing facilities*." *Id.*

Thus, both *WEPCo* and *Puerto Rican Cement* held that PSD may be triggered when there is NSPS "construction" activity—NSPS "modifications" of three existing units in *WEPCo*, and the installation of a brand new unit in *Puerto Rican Cement*. Neither court held that a project that was not a "modification" at all could be a "major modification."

c. *In 1992 EPA Promulgated the Optional "WEPCo Rule."*

In 1992, EPA promulgated a new rule known as the "WEPCo Rule." 57 Fed. Reg. 32,314 (July 21, 1992). This rule did not change the 1980 Rules governing the method for calculating emissions increases. Instead, the 1992 WEPCo Rule created an *optional* test for electric utilities, and the 1980 Rules remained the default. See Pet. App. 71a n.25. Under this test, utilities could compare pre-project "actual" emissions to post-project "projected actual" emissions. 40 C.F.R. § 51.166(b)(21)(v) (1993). However, this test is available *only* to utilities that satisfy certain post-project reporting requirements, see *id.*—which Duke did not do.[4]

5. The 1990 Amendments And EPA's Post-*WEPCo* Pronouncements Confirm The Established Definition Of "Modification."

The *WEPCo* case arose when EPA, Congress, industry, and environmental organizations were concerned that SO_2 emissions from coal-fired plants were causing acid rain. See, *e.g.*, S. Rep. No. 101-228, at 261-301 (1989). Addressing poten-

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[4] After successfully arguing that the 1992 Rules were irrelevant to the district court's analysis—because they are "optional"—the United States now appears to argue for their application here. U.S. Br. 20 & n.4. The United States' new position not only is wrong, it is improper. *See Zedner v. United States*, 126 S. Ct. 1976, 1987 (2006); *see also In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990) (barring party from changing position with respect to a "subsidiary question" on which he prevailed in prior proceedings, "[e]ven though [he] did not prevail on the appeal as a whole").

tial solutions to that problem, EPA's Assistant Administrator for Air stated at an "Acid Rain Conference" that the CAA's new source provisions had only limited applicability to existing coal-fired power plants. See JA84-88. He further explained that the Act's definition of "modification" did not cover "activities at a plant which tend to extend the useful life of that plant or tend to increase the total emissions generated over the total life of that plant." JA87.

Similarly, in 1987, EPA's Administrator testified that the new source programs did not require retrofitting new source controls on existing coal-fired power plants and that EPA opposed any legislation that would mandate such unit-by-unit controls. See JA89-95 (statement of Lee Thomas). According to the Administrator, "[t]here is nothing that EPA can do to prevent a powerplant which had previously been emitting at a level well below its SIP limit from increasing its emissions, as long as it remains below its legally sanctioned ceiling." JA14.

Congress ultimately enacted legislation to reduce SO_2 and NO_x emissions in the 1990 CAA Amendments, known as Title IV or the Acid Rain Program. During the Title IV debates, EPA provided analyses stating that existing coal-fired boilers would operate for an average of 55-65 years and that refurbishments would be undertaken without triggering PSD. See JA121-22; JA126-29; see also JA100-04. Several proposals would have required such boilers to retrofit new source control technologies—the precise result Petitioners and the United States seek here.[5] Congress rejected those proposals and enacted instead a national emissions "cap" and a "trading" regime that allows utilities to meet that cap through a variety of means, including installing pollution controls at

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[5] *See* S. 300, 100th Cong. § 2(a) (1987); S. 2203, 99th Cong. § 2(a) (1986); *see also* S. 316, 100th Cong. §§ 183(b)(1), (c)(1), 187 (1987); S. 321, 100th Cong. § 182(a) (1987); S. 2813, 99th Cong. §§ 183(b)(1), (c)(1), 187 (1986); S. 2200, 99th Cong. §§ 182(a), 184 (1986); H.R. 4567, 99th Cong. §§ 182(b), 184(f) (1986); S. 52, 99th Cong. § 183(e) (1985).

particular units, fuel switching, emissions trading, and other measures. See 42 U.S.C. §§ 7651-7651o; H.R. Rep. No. 101-490, pt. 1, at 365 (1990); *Clean Air Reauthorization (Pt. 2): Hearings before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 101st Cong. 234-36 (1989) (statement of W.G. Rosenberg, Assistant Adm'r, Air and Radiation, EPA).

Before and after the 1990 Amendments, EPA repeatedly stated that its WEPCo determination did not reflect any attempt to expand PSD. See Pet. App. 50a-53a. Thus, in response to a Government Accounting Office ("GAO") inquiry, EPA stated it did "not consider WEPCO's project typical of most utility life extension projects, and [it] expect[s] that the ruling will not significantly affect utilities' decisions to undertake power plant life extension projects." JA137; see JA155 (stating most power plant repair projects would not trigger PSD).[6] Indeed, if most power plant repair or replacement projects triggered PSD, then every power plant would have to install BACT, and the more flexible, market-based trading approach of Title IV would serve no purpose.

II. EPA CHANGED ITS INTERPRETATION IN THE 1999 "ENFORCEMENT INITIATIVE."

A. EPA's Enforcement Position.

In an abrupt reversal of position, EPA launched the "enforcement initiative" in November 1999. EPA filed lawsuits against numerous utility companies claiming that 549 maintenance, repair and replacement projects at 148 generating units located at 56 existing coal-fired power plants had violated NSR. See Duke C.A. App. 493-511. In this case, EPA al-

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[6] EPA knew of utility repair practices prevalent at the time—including several of Duke's projects here. *See* Letter from Reilly, EPA, to Rep. Dingell (Apr. 19, 1989), (Duke Mot. Summ. J. Ex. 45) (responding to question regarding Duke PMP project at Dan River Station); JA176-82 (Farmer Mem.) (identifying Duke PMP projects at Dan River, Allen, Riverbend, Cliffside and Buck Stations). *See also* Pet. App. 50a n.13 (describing EPA's knowledge of utility "life extension" projects).

leged violations at virtually all of Duke's 30 coal-fired units, located at eight plants in the Carolinas. The targeted projects took place as early as 1988.

Duke's plants consist of multiple generating units, and each unit has a permit allowing operations at full capacity 24 hours per day, 365 days per year, subject to emissions rate limits. JA165. Of course, many factors determine whether a particular unit runs at any given time—principally, consumer demand. Each unit is part of the integrated electricity grid, and changes in fuel cost, the unit's operating cost, congestion on the grid, shutdowns of other units, and demand for electricity (which, in turn, depends on time of day, weather, and economic factors) determine when and for how long a given unit is run. See, *e.g.*, *Northern Ind. Pub. Serv. Co.* v. *Colorado Westmoreland, Inc.*, 667 F. Supp. 613, 616-19 (N.D. Ind. 1987) (describing an electric generating dispatch system).

Notwithstanding these unpredictable fluctuations, Duke's units must be ready to run whenever they are needed—particularly during peak periods such as the hottest summer weekdays. Thus, Duke must maintain its units so they will be available at peak times to meet its duty to provide a reliable electricity supply. See N.C. Gen. Stat. § 62-2; S.C. Code Ann. § 58-27-1510; S.C. Code Ann. Regs. 103-360.

Most of the projects at issue involved repairs to and replacements of boiler tube assemblies during regularly-scheduled outages. Pet. App. 29a.[7] Typically, these outages are planned for spring or fall when demand is relatively low, and they can last from several weeks to months. The other projects occurred during "extended cold shutdown" ("ECS")—a period when Duke's smallest units were not needed, principally because new nuclear units were sufficient to satisfy demand. During this period, Duke "made definitive plans for preserving and conditioning the units ... so they

[7] The "Buck 4" project was featured in the district court's decision because EPA sought summary judgment for that project, not because it was "representative" of all projects as Petitioners claim. *See* Pet. App. 26a n.3.

could be returned to service when demand dictated." Pet. App. 27a-28a; JA165-66. Duke also developed an enhanced maintenance program, the "Plant Modernization Program" ("PMP"), which involved consolidating projects so that they could be performed together. Pet. App. 28a; JA166. Although consolidated, the work was no different from the boiler and turbine repair and replacements commonly undertaken throughout Duke's system and the industry.

Throughout this time, Duke was in frequent contact with state regulators and informed them of the work to be done at its units. JA183-88. The agencies responded that re-starting the units after temporary shutdown would not trigger NSPS or PSD, so long as the units' permits were current and they remained in the States' emissions inventories. JA191-92 (North Carolina); JA189-90 (South Carolina).

State regulators also inspected Duke's plants regularly and witnessed the work being performed. Duke's records contain at least 23 inspection reports that include observations that units were under repair and certifications of compliance with all applicable air quality regulations. For example, during a 1987 permit renewal for Buck 4, the state permit writer observed: "Unit Nos. 3, 4 & 5 are currently in the Plant Modernization Program (PMP) ... until 1989," and noted that "PSD, NSR, [and] NSPS ... do not apply." JA197.

EPA, too, was aware of utility repair practices, including the "industry practice of engaging in life extension projects." Pet. App. 50a n.13. In the two decades before the "enforcement initiative," EPA conducted thousands of utility plant inspections. It visited plants while boiler component replacements were ongoing, but never cited them as PSD violations. *Id.* Indeed, EPA knew of many of the projects at issue here, but raised no questions about them. See *id.* Thus, accepting EPA's newly-minted interpretation of PSD would mean that the Agency ignored the law for two decades.

None of the projects at issue created any new or unregulated emissions, and none of the work allowed the units to

operate any differently than they had operated in the past. In fact, the parties stipulate that none of the projects increased the maximum achievable hourly emission rate of any of the units (*i.e.*, none was a "modification"). Pet. App. 88a-89a. Rather, Petitioners say Duke's projects enabled the facilities to respond more reliably to calls for electrical generation and thus should have been "projected to result in increased utilization of the units at issue." *Id.* at 88a.

In the district court, EPA moved for partial summary judgment on the question of how to calculate an "emissions increase," and Duke cross-moved for summary judgment. The district court held that the plain language of the 1980 Rules, the plain language of the statute, EPA's prior interpretations, and the *WEPCo* decision all demonstrated that EPA's position is wrong—because "in order to undergo 'construction' as defined in PSD, an existing source must also undergo a 'modification' as defined in NSPS." Pet. App. 63a. The Fourth Circuit affirmed. *Id.* at 19a.

By contrast, in the most recent appellate decision involving the enforcement initiative—issued after the Court granted *certiorari* in this case—the Seventh Circuit deferred to EPA's interpretation of its rules. See *United States* v. *Cinergy Corp.*, 458 F.3d 705 (7th Cir. 2006). However, the court did not address the argument that a "modification" is required before a "major modification" occurs. Instead, the court rested its decision on the observation that the "major modification" rules speak in terms of "annual" increases, not "hourly" increases—a point that no one disputes. *Id.* at 709-10. The court also pointed to a purported distinction between the purpose of the NSPS and PSD programs that no party argued and that does not exist, see *id.* at 710-11 (incorrectly stating that NSPS regulates "input," while PSD regulates "output"), and without further analysis simply deferred to EPA's interpretation.[8]

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[8] In an earlier case, the Eleventh Circuit vacated EPA's effort to impose its interpretation on TVA through an "exceedingly unusual," "ad hoc"

B. The D.C. Circuit Did Not Address EPA's Enforcement Position In *New York I*.

In 2002, while this case was being litigated, EPA promulgated new rules revising the "major modification" provisions. See 67 Fed. Reg. 80,186 (Dec. 31, 2002). These rules do not apply to the projects at issue—all of which occurred before 2002. Moreover, these rules likely will be superseded. See *infra* at 21. In any event, these rules look to whether a "project" results in an "actual-to-projected-actual" emissions increase—the test EPA now tries to distort the 1980 Rules to incorporate. 40 C.F.R. § 51.166(a)(7)(iv)(c) (2005).

All sides challenged the 2002 rules, and some moved to reopen their challenges to the 1980 and 1992 rules. The court consolidated the challenges and generally upheld the 2002 rules in an opinion issued after the decisions in this case. See *New York I*, 413 F.3d 3. Although the court rejected the argument that Congress adopted the NSPS rules wholesale into the PSD statute,[9] the court declined to address the Fourth Circuit's decision, "express[ing] no opinion as to whether Congress intended to require that EPA use identical regulatory definitions of modification across the NSPS and NSR programs." *Id.* at 19-20. The court also declined to address industry's challenge to a "new interpretation of the 1980 rule" articulated in later preambles, on the ground that it was unripe. *Id.* at 20. According to the D.C. Circuit, "[i]f there are still pending applications of the 1980 rule in which EPA attempts to employ the disputed [interpretation] ... judicial pro-

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administrative proceeding that "entirely ignore[ed] the concept of the rule of law." *TVA* v. *Whitman*, 336 F.3d 1236, 1240-41 & n.9, 1245-46 (11th Cir. 2003).

[9] In rejecting industry's challenge, the D.C. Circuit incorrectly read the NSPS regulations as including two, "inconsistent" definitions of "modification." *New York I*, 413 F.3d at 19-20 (citing 40 C.F.R. §§ 60.2(h), 60.14(b)). As EPA stated at the time of promulgation, the second regulation is not "inconsistent" with the first, but merely describes in detail the method for calculating emissions. *See* 39 Fed. Reg. at 36,947.

ceedings addressed to the application could solve the problem of any affected firm." *Id.* at 20-21.[10]

C. In October 2005, EPA Proposed A New Rule Abandoning Its Enforcement Position.

In October 2005, EPA proposed to resolve the confusion created by its enforcement initiative and to re-affirm its original standard for determining whether a "modification" has occurred—a standard that "is the same as that in the ... [NSPS] program." 70 Fed. Reg. at 61,081. Under the proposed rule, EPA will use the "same maximum achievable hourly emissions test [it] appl[ies] under NSPS to determine whether a physical change in or change in the method of operation ... results in an emissions increase." *Id.* at 61,088.

EPA admitted that the "approach [it has] been taking [in the enforcement initiative] leads to outcomes that have not advanced the central policy of the major NSR program." *Id.* In particular, EPA's enforcement position "discourages sources from replacing components, and encourages them to replace components with inferior components or to artificially constrain production in other ways," and "has impeded or resulted in the cancellation of projects that would have maintained and improved the reliability, efficiency, or safety of existing energy capacity." *Id.* at 61,094. These perverse effects occur because the standard applied in this litigation *assumes* that any component repair will cause the unit to run more hours and produce more emissions, even if the unit's actual emission rate will not change. See *Alabama Power*, 372 F. Supp. 2d at 1297. Thus, like the position rejected in *WEPCo*, EPA's enforcement initiative approach "assume[s] what [it] seek[s] to prove." 893 F.2d at 917. By contrast, the longstanding "modification" standard properly focuses on in-

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[10] The D.C. Circuit decision confirms that it is up to the regional courts to decide whether a new interpretation of the 1980 Rules withstands scrutiny—contrary to Petitioners' hyperbolic claim that the Fourth Circuit's decision was the most "serious affront" imaginable to D.C. Circuit's jurisdiction. Pet. Br. 2.

creases in an emission unit's actual emissions capacity, and thus "allow[s] owner/operators to make changes that, without increasing existing capacity, promote the safety, reliability, and efficiency" of their units. 70 Fed. Reg. at 61,093.

SUMMARY OF ARGUMENT

The court of appeals and district court correctly held that EPA improperly used this enforcement litigation to impose PSD pre-construction requirements where the statute and regulations do not apply.

I. As an initial matter, § 307(b) does not divest the courts of jurisdiction to address EPA's enforcement interpretation. Section 307(b) states that "[a]ction[s] of the Administrator with respect to which review could have been obtained" by filing an expedited "petition for review" in the D.C. Circuit are not reviewable in later enforcement proceedings. 42 U.S.C. § 7607(b)(1)-(2). This case does not involve "[a]ction[s] ... with respect to which review could have been obtained" in a petition to review the 1980 Rules. Duke does not contend the 1980 Rules are invalid; it contends EPA's subsequent re-interpretation of them is improper.

Nor could Duke have raised its objections to EPA's interpretation in 1980, for the simple reason that EPA did not interpret the regulations then as it does now. In 1980, EPA interpreted its regulations consistently with their plain language and the text of the CAA—as requiring an NSPS "modification" to trigger PSD "major modification" review. EPA articulated this interpretation in two contemporaneous determinations—which, although the United States attempts to disavow them, presented the Agency's authoritative view at the time. JA27-28; JA35-37. Had anyone filed a petition in 1980 contending EPA might change its position in the future, the petition would have been dismissed as unripe. Thus, to hold that EPA's position is unassailable here would insulate that position from challenge altogether. Given that the CAA carries criminal and civil penalties, this result would be inconsistent with fundamental fairness.

Allowing courts to address EPA's enforcement position in no way undermines the purposes of § 307(b), as the United States contends. If EPA wanted to obtain expedited D.C. Circuit review, it should have articulated its interpretation in a nationally applicable, prospective "final action," not in retrospective individual enforcement proceedings as it did here.

In any event, Petitioners' and the United States' contention that the courts below exceeded their jurisdiction is inseparable from their contention that those courts misconstrued the regulations. Because the Court thus must resolve the merits question, conflating the two serves no purpose.

Finally, Duke's objections to EPA's position were not raised in a challenge to the 1980 Rules. The 1981 brief the United States cites for this proposition raised an entirely different argument regarding EPA's method of "netting" emissions. And the D.C. Circuit in *New York I* refused to rule on EPA's later interpretations, instead deferring to pending enforcement proceedings for their resolution.

II. The plain language of the 1980 Rules establishes "modification" as the trigger for PSD "major modification" review. The 1980 Rules require PSD permits for "construction," which is defined to include "modifications." 40 C.F.R. § 51.166(i)(1), (b)(8). And the rules' "general provisions" define "modification" as it is defined under the NSPS rules and the Act. *Id.* §§ 51.100, 52.01(d). In promulgating this definition, EPA stated that it was intended to be "consistent with the definition used in" NSPS. 39 Fed. Reg. at 42,513. Thus, like NSPS, PSD applies only to projects that change a unit's basic emissions capacity—which always has been measured in terms of the unit's hourly emissions rate.

If an NSPS modification does occur at a unit, then the source's annual emissions are examined to see if the modification is "major." The structure of the "major modification" rule confirms that increases in operating hours do not trigger PSD. A "major modification" requires an increase in "actual emissions," which does not include increases in hours of op-

eration. 40 C.F.R. § 51.166(b)(2)(iii)(f). "Actual emissions" are measured on an annual basis using a constant, "representative" operating period prior to the change. *Id.* § 51.166(b)(21)(ii); *WEPCo*, 893 F.2d at 918 n.14. Thus, an "actual," "annual" emissions increase occurs only if a unit's hourly emissions rate increases—*i.e.*, if there is a change in the unit's fundamental ability to emit pollutants.

In 1981, EPA confirmed that these regulations mean what they say in two formal applicability determinations. These contemporaneous interpretations demonstrate the 1980 Rules' meaning and intent, which EPA cannot retroactively change through enforcement litigation.

III. EPA's enforcement interpretation is inconsistent with the Clean Air Act. The plain language of the statute limits PSD review to projects that are "modifications" under NSPS. See 42 U.S.C. § 7479(2)(C) (defining "modification" "as defined in section 7411(a) of this title"). The express incorporation of the NSPS concept of "modification" into PSD is irrefutable evidence that Congress intended to limit that concept under PSD. See *IBP, Inc.* v. *Alvarez*, 126 S. Ct. 514, 523 (2005). EPA cannot interpret the rules in a manner that violates this statutory restriction. See *Stinson* v. *United States*, 508 U.S. 36, 45 (1993).

Congress based the statutory PSD program on the preexisting regulatory PSD program, codifying certain provisions, modifying others, and rejecting others altogether. This selective incorporation further confirms that Congress deliberately chose the term "modification" to define the scope of PSD applicability to existing sources. *Lorillard* v. *Pons*, 434 U.S. 575, 582 (1978). The legislative debates similarly reflect Congress's intent to avoid imposing PSD's preconstruction requirements on existing sources as a general matter. See, *e.g.*, H.R. Rep. No. 95-294, at 185 (1977). By contrast, there is no mention in the statute or legislative history that Congress intended to apply this "new source" pro-

gram to existing facilities in an entirely different and much broader way than the CAA previously had applied to them.

If Congress had intended such a sweeping change, it surely would have said so. Not until the 1990 Acid Rain Amendments did Congress address the issue of long-term SO_2 and NO_x emissions from existing power plants. And in enacting those amendments Congress rejected the universal application of PSD controls in favor of a market-based trading program—which is incompatible with Petitioners' and the United States' approach here.

In the end, Petitioners and the United States invoke the purported purposes of PSD to avoid the statute's plain language. This approach violates basic principles of statutory construction. Moreover, it overstates the differences between PSD and NSPS, because both impose technological control requirements and both protect the ambient air. The language of the statute is the true indicator of how Congress intended to further its general purposes. And EPA's enforcement position is inconsistent with that language and intent.

ARGUMENT

I. THE COURTS BELOW HAD JURISDICTION TO CONSIDER EPA'S ENFORCEMENT INTERPRETATION.

Petitioners and the United States contend that the courts below lacked jurisdiction to address EPA's enforcement interpretation because Duke's objections to that interpretation "'could have been' resolved" in a petition to review the 1980 Rules in the D.C. Circuit pursuant to § 307(b)(1) of the Act. Pet. Br. 29; U.S. Br. 17. They are incorrect.

A. Duke Does Not Challenge The Validity Of The 1980 Rules, It Challenges EPA's 1999 Interpretation.

Section 307(b)(2) provides that "[a]ction[s] of the Administrator with respect to which review could have been obtained" through a petition for review pursuant to § 307(b)(1) "shall

not be subject to review in civil or criminal proceedings for enforcement." 42 U.S.C. § 7607(b)(2). Section 307(b)(1), in turn, authorizes "petitions for review" of certain "action[s] of the Administrator"—including "promulgating any national primary or secondary ambient air quality standard . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator." *Id.* § 7607(b)(1). Any such challenge must be filed in the D.C. Circuit "within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register." *Id.*

In this case, there was no "[a]ction" that could have been the subject of a petition for review under § 307(b)(1). Duke objects to EPA's subsequent *interpretation* of its regulations, which the Agency created and attempted to apply in its 1999 enforcement initiative. Indeed, the issue of the proper interpretation of the 1980 Rules was first raised *by EPA* in this case, in a motion for summary judgment seeking a ruling that "emissions calculations for PSD applicability must ... consider future utilization." U.S. Mot. Summ. J. at 15.

In response to EPA's motion, Duke did not contend that the 1980 Rules are contrary to the statute or otherwise invalid. Rather, Duke argued that the plain language of the statute and the 1980 Rules do not support EPA's litigating position. The district court agreed, basing its analysis "on the PSD rules, the contemporaneous interpretations of the PSD rules, and the statutory language incorporating the NSPS concept of modification into PSD." Pet. App. 58a. Thus, the court did not "invalidate" the 1980 Rules. It merely rejected EPA's new interpretation as inconsistent with them.

In the Fourth Circuit EPA asked the court to "resolve th[e] question" whether it "'can interpret the statutory term modification under PSD differently from how' it has interpreted that term under NSPS." Pet. App. 15a n.7. "[N]o question as to the validity of the PSD regulations [was] presented ...." *Id.* Only after the Fourth Circuit signaled in a supplemental brief-

ing request that it was not accepting EPA's position did EPA argue that the court lacked jurisdiction. See *id.* at 21a.

This eleventh-hour argument is without merit. It is well established that the regional courts may consider agency interpretations of the PSD regulations, particularly in an enforcement action. See, *e.g.*, *WEPCo*, 893 F.2d at 914 n.6 (holding § 307(b) did not bar consideration of the question "whether the EPA properly applied these regulations"); *Puerto Rican Cement*, 889 F.2d at 296, 299 (considering whether EPA had applied an "arbitrary, and contradictory interpretation of EPA's own regulations"). Thus, the D.C. Circuit has required parties to challenge interpretations of these rules in individual proceedings rather than in omnibus rule challenges. See *New York I*, 413 F.3d at 21 (refusing to consider an interpretation of the 1980 Rules in favor of "judicial proceedings" in individual cases). And every court to consider EPA's enforcement interpretation has (usually on EPA's motion) resolved the issue on the merits. See *Cinergy*, 458 F.3d at 709; *United States* v. *Cinergy Corp.*, 384 F. Supp. 2d 1272, 1276 (S.D. Ind. 2005), *aff'd*, 458 F.3d 705; *Alabama Power*, 372 F. Supp. 2d at 1299-1300; *United States* v. *Ohio Edison Corp.*, 276 F. Supp. 2d 829, 862 (S.D. Ohio 2003); see also *United States* v. *American Elec. Power Serv. Co.*, 218 F. Supp. 2d 931, 951 (S.D. Ohio 2002).

Nor does § 307(b) bar courts from deciding "statutory questions" or "statutory" arguments as Petitioners and the United States imply. See, *e.g.*, Pet. Br. 3, 33 & nn.24-25, 37-38; U.S. Br. 17, 19. It bars the review of "*[a]ction* ... with respect to which review could have been obtained" under § 307(b)(1). 42 U.S.C. § 7607(b)(2) (emphasis added); see also *Madison Gas & Elec. Co.* v. *EPA*, 4 F.3d 529, 531 (7th Cir. 1993) ("Congress could have channeled all Clean Air Act cases to the D.C. Circuit but obviously decided not to."). An agency always is bound by the governing statute, even when interpreting its underlying rules. See, *e.g.*, *Stinson*, 508 U.S. at 45. If review (even "statutory" review) of an agency interpreta-

tion "could not have been obtained" via a petition for review, it is not barred by § 307(b)(2).

B. Duke Could Not Have Raised Its Arguments In An Expedited Petition Under § 307(b)(1).

Duke could not have challenged EPA's enforcement position in a petition for review in 1980 because EPA did not interpret its rules then the way it does now. To the contrary, at the time EPA interpreted its rules to require an NSPS "modification" to trigger a "major modification" analysis under PSD—as Duke contends they should be interpreted.

The rules as promulgated clearly provided that a PSD "major modification" first requires an NSPS "modification." 40 C.F.R. §§ 51.100, 52.01(d). The rules also made plain that increases in operating hours were neither "modifications" nor "major modifications," *id.* § 51.166(b)(2)(iii)(f), and EPA's own contemporaneous statements confirmed that this exclusion required an emissions rate increase. See *infra* at 36-37. For example, EPA's Director of its Division of Stationary Source Enforcement ("DSSE"), shortly after the rules were promulgated, twice announced that a project that causes an increase in a unit's hours of operation but does not increase the unit's hourly emissions rate is not a "modification" under PSD. JA27-28, 35-37. Although the United States now denigrates the Director as a "mid-level EPA official" who made an "incorrect" conclusion, U.S. Br. 28, the Director was charged by EPA with issuing official interpretations of the PSD rules. JA477-79. Moreover, there are no contrary Agency pronouncements, and the Director's determinations have previously served as "final agency action" subject to judicial review in this Court. See *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 583 n.2 (1980); *PPG Indus. Inc.* v. *Harrison*, 587 F.2d 237, 241-42 (5th Cir. 1979).[11]

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[11] EPA has posted these applicability determinations on its database of guidance documents, http://www.epa.gov/nsr/guidance.html. *See* http://www.epa.gov/Region7/programs/artd/air/nsr/nsrmemos/gastrbns.pdf (GE Determination); /crgilinc.pdf (Cargill Determination). A search conducted

Had anyone filed a petition in 1980 claiming that an increase in operating hours could not be a "major modification," it would have been dismissed as unripe. Section 307(b) cannot and does not grant jurisdiction to adjudicate hypothetical issues. See *Clean Air Implementation Project* v. *EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998). Of course, "[a] necessary corollary [of this principle] is that if the issues later become justiciable, as a result for instance of an enforcement action, the petitioner may then raise those issues, notwithstanding" § 307(b)(2). *Id.* See also *Monsanto Co.* v. *EPA*, 19 F.3d 1201, 1203 n.2 (7th Cir. 1994) (observing that "judicial review 'could [not] have been obtained' under § 307(b)(1)," and thus would not be barred later, if no controversy existed at the time of a rule's promulgation) (alteration in original).

C. Insulating EPA's Position From Scrutiny Has No Basis In § 307(b) And Is Inconsistent With Fundamental Fairness.

The United States essentially is seeking a ruling that its enforcement position is insulated from review altogether, because that position was not articulated until decades after the time for challenging the 1980 Rules had expired. Given the substantial civil and criminal penalties that flow from a PSD violation, this Catch-22 argument cannot be reconciled with principles of fundamental fairness. See *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 284 (1978). It also would contravene the ordinary presumption that agency decisions are subject to judicial review. See *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 140 (1967).

Allowing a court to address EPA's interpretation in an enforcement action does not undermine the purposes of § 307(b). See U.S. Br. 18. Congress drafted § 307(b) to require expedited D.C. Circuit review of certain EPA actions—and *only* those actions. Where, as here, EPA attempts to impose new interpretations of its rules in multiple retrospective

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during the proceedings below found that the Director authored 105 of the 557 documents posted on that site. *See* Duke C.A. Br. 70 n.66.

enforcement actions, it necessarily exposes those interpretations to multiple instances of judicial scrutiny.

The way to ensure the uniform application and expeditious review of a new agency interpretation is to articulate that interpretation in nationally applicable "final action" published "in the Federal Register." 42 U.S.C. § 7607(b)(1). This well-recognized procedure has numerous benefits. These include providing the regulated community notice of and an opportunity to plan for a new interpretation—which is particularly important where, as here, complying with the interpretation would cost billions and recovery of those costs may require regulatory approval—and allowing comprehensive review on the basis of an administrative record. In return, Congress determined that agency decisions made and announced through such procedures deserve exclusive and expedited review under § 307(b), for all of the laudable reasons Petitioners and the United States extol. Because EPA has followed none of those requirements in this case, § 307(b) does not insulate EPA's interpretation from consideration now.[12]

D. Petitioners' And The United States' Jurisdictional Argument Is Inseparable From Their Argument That The Courts Below Erred On The Merits.

Petitioners' and the United States' claim that the courts below "offended" § 307(b) depends entirely upon their claim that those courts erred on the merits. Their arguments begin

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[12] Allowing EPA to insulate its interpretations from judicial review also would encourage agencies to promulgate vague regulations and implement policy through later, unreviewable interpretations. The regulated community, in turn, would be forced to challenge a host of hypothetical interpretations in expedited § 307(b) proceedings. Neither proposition is desirable as a matter of fairness to litigants or the orderly administration of the courts—particularly as similar expedited review provisions appear in a number of statutory schemes. *See, e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2060(a); Federal Trade Commission Act, 15 U.S.C. § 57a(e)(1)(A); Federal Power Act, 16 U.S.C. § 825l(b); Clean Water Act, 33 U.S.C. § 1369(b); Federal Communications Act, 47 U.S.C. § 402(a).

by setting up a "straw man" mischaracterizing Duke's arguments and the decisions below. Specifically, Petitioners contend that Duke's position is that "the plain language of the [CAA] mandated that EPA adopt identical modification regulations for the NSPS and the NSR programs." They then assert that such a claim would have presented a "'facial' challenge" to the 1980 Rules. Pet. Br. 29-31; see U.S. Br. 19-25. But this does not accurately describe Duke's position—which is that there must be a "modification" before there can be a "major modification" under the 1980 Rules.

Petitioners' jurisdictional argument ultimately rests on the proposition that the district court's "reading" of the rules "is manifestly wrong." Pet. Br. 35. The United States goes even farther, presenting its entire regulatory argument in the jurisdictional section of its brief. U.S. Br. 20-35. In essence, Petitioners and the United States contend that their interpretation of the 1980 Rules is "correct" and any contrary argument is an attack on the rules that had to be brought under § 307(b). Conflating the jurisdictional and merits arguments in this manner renders the jurisdictional argument superfluous—which is presumably why EPA did not make the argument until its position on the merits was in jeopardy. The Court should reject this effort to expand the scope of § 307(b) and should reach the question whether EPA's enforcement position is consistent with the CAA and 1980 Rules.

E. Duke's Challenge Was Not Raised By Others Following The Promulgation Of The 1980 Rules.

Finally, the United States mischaracterizes a brief filed in 1981 by GM and others (the "*CMA* petitioners") to argue that parties *did* seek review of EPA's enforcement position in 1981. U.S. Br. 32-33. As noted above, that brief—which Duke did not join—contended that EPA's switch from a source-wide "design capacity" (or "potential-to-potential") test to a source-wide "actual emissions" test for the "major

modification" "netting" analysis violated the CAA. See *supra* at 11. That is not Duke's argument.[13]

Duke's contention is that an NSPS "modification" is required before a "major modification" analysis can occur. An NSPS "modification" occurs only if an increase in a unit's maximum achievable hourly emissions rate occurs. 40 C.F.R. § 60.14. As EPA has stated, "a test based on maximum achievable hourly emissions *is* a test based on actual emissions." 70 Fed. Reg. at 61,091 (emphasis added). This is the opposite of the *CMA* petitioners' position, which was that EPA violated the statute by using a test for a "net increase in actual rather than potential emissions." *CMA* Br. 17.

New York I, in turn, principally involved a challenge to the 2002 rules. Industry also challenged EPA's attempt to reinterpret the 1980 Rules, through preamble statements in the 1998 proposal and 2002 rules, to require an "actual-to-potential" test for projects at existing units, regardless of whether the unit has begun normal operations. *New York I*, 413 F.3d at 18. Industry alternatively contended that the 1980 Rules would be inconsistent with the Act if they were so interpreted and that a final rule with that meaning would not have been a "'logical outgrowth'" of the proposed rule. Joint Br. Industry Pet'rs at 34-36, *New York I*, No. 02-1387 (D.C. Cir. May 11, 2004). Moreover, although the D.C. Circuit did not agree that Congress adopted the NSPS rules wholesale into PSD, the court ultimately did not resolve industry's arguments, because it refused to pass on EPA's interpretation of the 1980 Rules. *New York I*, 413 F.3d at 19-20. Instead, the court held that the issue was unripe and observed that "judicial proceedings" involving "pending applications" of the 1980 Rules—*i.e.*, individual enforcement proceedings such as

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[13] The United States muddles the two arguments through loose use of the term "capacity," incorrectly treating "design capacity" (a measurement of emissions potential advanced by the *CMA* petitioners for netting purposes) and "actual capacity" (the measurement of actual emissions capability required by the 1980 Rules) as interchangeable. U.S. Br. 32.

this one—"could solve the problem of any affected firm." *Id.* at 20.

In short, the question whether EPA's enforcement interpretation of the 1980 Rules is proper has not been resolved by the D.C. Circuit and is not subject to the exclusive jurisdictional provision of § 307(b)—as even that court has held.

II. UNDER EPA'S RULES, A PROJECT IS A "MAJOR MODIFICATION" ONLY IF IT IS FIRST A "MODIFICATION," WHICH REQUIRES AN INCREASE IN A UNIT'S EMISSIONS RATE.

The PSD statute and rules require pre-construction review of a project at an existing unit only if that project is a "major modification." The plain language and structure of the rules compel the conclusion that a PSD "major modification" first requires an NSPS "modification"—a change that causes an increase in a unit's hourly emissions rate. A project that does not increase that emissions rate, even if it allows increased hours of operation, is not a "modification" and therefore *a fortiori* is not a "major modification."

A. The Plain Language Of The 1980 Rules Establishes An NSPS "Modification" As The Trigger For PSD "Major Modification" Review.

Consistent with the Act, the 1980 Rules require sources to obtain a permit before "begin[ning] actual construction" on a project that is subject to PSD. 40 C.F.R. § 51.166(i)(1). "Construction" means the "fabrication, erection, installation, demolition *or modification*" of a facility "which would result in a change in actual emissions." *Id.* § 51.166(b)(8) (emphasis added).[14]

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[14] *See also* 40 C.F.R. § 52.21(i)(1), (2) (requiring pre-construction permitting only for "modification[s] to which the requirements of paragraphs (j) through (r) of this section apply," and stating that "[t]he requirements of paragraphs (j) through (r) of this section" apply to "major modification[s]"); S.C. Code Ann. Regs. 61-62.5, Standard 7, § (i)(1), (2) (2001) (same).

The general provisions of both Parts of the 1980 Rules define "modification" as that term is defined under the Act—an NSPS "modification." The "general definitions" of Part 52 define "modification" as "any physical change in, or change in the method of operation of, a stationary source *which increases the emission rate* of any pollutant," excluding any increase in hours of operation, 40 C.F.R. § 52.01(d) (emphasis added). EPA stated in promulgating this definition that it was meant to be "consistent with the definition used in" NSPS. 39 Fed. Reg. at 42,513. Similarly, the "general definitions" section of Part 51, which contains no definition of "modification" but essentially mirrors Part 52, states that "all terms not defined herein will have the meaning given them in the Act." 40 C.F.R. § 51.100. Thus, under the 1980 Rules, a project at an existing unit is eligible for PSD review only if it is a "modification" as defined by Congress, which expressly incorporated the NSPS definition. If EPA had intended to eliminate "modifications" as a requirement for PSD review, it would have adopted a rule that said so.

Moreover, not all NSPS "modifications" are ultimately subject to PSD. PSD applies only to larger, source-wide increases that have significant air quality impacts. Reflecting this focus on "'major emitting facilit[ies],'" 42 U.S.C. § 7479(1), the 1980 Rules require pre-construction permitting only for those "modifications" at individual units that result in "major modifications" at the overall source. See 40 C.F.R. § 51.166(b)(2)(i).

The definition of "major modification" assures that PSD applies only to NSPS "modifications" that are "major." Indeed, the whole structure of the "major modification" provision confirms the conclusion that an NSPS "modification" is required to trigger a PSD "major modification" analysis. First, for a "major modification" to occur, any "increase" in actual emissions must result from a "physical [or operational] change," which even EPA concedes by definition excludes "[a]n increase in the hours of operation" unless restricted by

permit. *Id.* § 51.166(b)(2)(iii)(f). Since the inception of the new source rules, this "hours of operation exclusion" has assured that a "modification" would occur only where an hourly rate increase occurs. See 39 Fed. Reg. at 36,947 (explaining that the kg/hr test would "automatically allow increases in operating hours as intended by [the operating hours exclusion in] 40 C.F.R. 60.2(h)").

EPA excluded increases in operating hours from the PSD definitions of "modification" and "major modification," see 40 C.F.R. §§ 52.01(d), 51.166(b)(2)(iii)(f)—reasoning in part that Congress intended those terms "to include all exemptions included in the NSPS regulations promulgated . . . prior to the date of [PSD's] enactment." JA25; see also 49 Fed. Reg. at 43,213; 43 Fed. Reg. at 26,394; 68 Fed. Reg. at 61,269. Thus, a "major modification" analysis is required for an existing unit *only* where activity increases the hourly emissions rate—*i.e.*, only for "construction," which includes NSPS "modification[s]." 40 C.F.R. § 51.166(b)(8).

Second, a "major modification" occurs only if a project increases the "actual emissions" of a pollutant at the overall source. The rules include a single definition of "actual emissions" for units that have begun normal operations. "Actual emissions" are based on the average annual emissions during a period that is "representative of normal source operation." *Id.* § 51.166(b)(21)(ii). To determine whether an emissions increase will occur—and, if so, how large that annual emissions increase will be—"actual emissions" must be determined using the same representative period before and after the project. *Id.*; see also *WEPCo*, 893 F.2d at 918 n.14.

Once "actual," "annual" emissions are determined, sources may offset any emissions increase at the unit with contemporaneous decreases at the source. See 45 Fed. Reg. at 52,698. In this netting process, emissions increases and decreases are again expressed in total pollutant loads (tons per year), rather than in short-term emissions rates (kilograms per hour). But using constant, representative hours of operation for these

calculations ensures that an annual emissions increase is found only if a unit's hourly emissions rate increases, reflecting an increase in the unit's actual capacity to emit. See *Alabama Power*, 372 F. Supp. 2d at 1293; Pet. App. 60a.

B. EPA's Contemporaneous Interpretation Of The Rules Was That An NSPS "Modification" Is The Trigger For PSD "Major Modification" Review.

Immediately after the promulgation of the 1980 Rules, EPA issued authoritative determinations that a PSD "major modification" will not occur if an NSPS "modification" does not occur—and that an increase in hours of operation does not trigger "major modification" review.

In January 1981, EPA's Director of DSSE responded to an inquiry from a company that was considering adding a new unit (an ethanol plant), which would "cause a large increase in the hours of operation of the [existing] power plant and a fuel switch to burn coal exclusively." JA35. The Director followed a two-step process. First, he noted that the addition of the ethanol plant "should be considered a modification." Second, he addressed how "to determine if the modification is major and subject to pre-construction PSD review"—including by considering "netting" and "significance" levels. JA36. However, the Director went on to explain that "in the absence of any SIP or permit limitations, neither the increase in emissions from the [fuel] switch ... nor the increase in hours of operation at the power plant would be considered a modification," citing the hours of operation exclusion and its companion fuel switch exclusion. *Id.* (citing 40 C.F.R. § 52.21(b)(2)(iii)(e) & (f)). Thus, not only did the Director address the "modification"/"major modification" distinction, he also applied the hours of operation exclusion to a physical change that caused an increase in operating hours.

In June 1981, the Director issued a second formal applicability determination, regarding a project that would allow turbines to convert to natural gas. JA27-28. Noting that the units' emissions rates would decrease as a result of the pro-

ject, the Director stated that NSPS would not apply. JA27. Furthermore, because the hourly emissions rate would not increase, "[a]ctual emissions could increase only if there is an increase in the production rate or hours of operation." JA28. The Director again relied upon the hours of operation exclusion in determining that PSD review was not triggered. *Id.*

These authoritative EPA statements, issued at the time the 1980 Rules were promulgated, confirm the plain meaning of those rules. See, *e.g.*, *Ohio Dep't of Human Servs.* v. *HHS*, 862 F.2d 1228, 1234-35 (6th Cir. 1988); see also *Solid Waste Agency* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 168 (2001) ("*SWANCC*") (relying on agency's original interpretation, reflected in rules "promulgated two years after its enactment," to determine the meaning of a statute). Where, as here, a meaning "'is compelled by the regulation's plain language [and] by other indications of the [agency]'s intent at the time of the regulation's promulgation,'" that meaning controls. *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (quoting *Gardebring* v. *Jenkins,* 485 U.S. 415. 430 (1988)). Even if the rules were ambiguous as the United States contends, EPA may not reverse its interpretation by means of an enforcement action retroactively targeting twenty years of accepted practice. See *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (original authoritative interpretation of a rule can be changed only by prospective rulemaking, because "[t]hose regulated by an administrative agency are entitled to know the rules by which the game will be played" and to participate in the rulemaking process (quotation omitted)).

C. Petitioners' And The United States' Regulatory Arguments Are Incomplete And Incorrect.

Petitioners and the United States make three principal arguments to support their new interpretation of the rules at issue. First, they assert that Duke's position is not based on "*actual*" emissions. Pet. Br. 39 (emphasis added). Second, they contend that Duke's position ignores the PSD rules' use

of "*annual*" emissions. *Id.* at 40 (emphasis added). Third, they attack the district court's reliance on the hours of operation exclusion, claiming this provision excludes increased utilization *only* when it is "'unaccompanied by physical construction to the unit itself.'" *Id.* at 36; see U.S. Br. 25-29.

The first two arguments are red herrings. Duke's position is based upon an analysis of both "actual" and "annual" emissions. The NSPS hourly "emissions rate" test is an "actual emissions" test, as EPA itself has acknowledged. See 70 Fed. Reg. at 61,091 ("[A] test based on maximum achievable hourly emissions is a test based on actual emissions."). This is because "[t]he maximum achievable hourly emissions test measures what a source has been actually able to emit based on physical and operating capacity during a representative period prior to the change." *Id.* And Duke has never disputed that the "major modification" analysis uses "annual emissions"—*if* a "modification" first occurs. As the district court observed, a "significant net emissions increase" under the 1980 Rules "must be calculated on an annual basis [because] measuring emissions in tons per year makes possible netting (addition and subtraction) of emissions rates between various units at the plant." Pet. App. 64a-65a.

Petitioners' and the United States' attack on the hours of operation exclusion focuses on EPA's own 1981 applicability determinations, which they disparage as a "mid-level" official's errors. But, the Director was not "a low-level employee from an irrelevant division opining as to what he believed the appropriate interpretation of the EPA regulations should be"; he was "the head of the division at the EPA responsible for 'providing guidance for interpretations which address the implementation of [the PSD] regulations.'" Pet. App. 61a-62a (alteration in original). To "ensure uniform national policy.... [EPA] policy require[d] that DSSE ... make the final recommendation for interpretation of these requirements." JA479. Nor did DSSE make these determinations alone. For example, the Cargill Determination was "made with the concur-

rence of the Office of Air Quality Planning and Standards [OAQPS]"—the division that writes and promulgates CAA rules—"and the Office of General Counsel [OGC]." JA36.

At bottom, Petitioners' arguments seek to re-write the hours of operation exclusion to say that an increase in hours of operation "standing alone" does not constitute a modification. Pet. Br. 36 (regulation excludes increase in hours of operation only when increase is "'unaccompanied by physical construction'"). This argument contradicts the rules' plain language, which contains only one limitation: the increase in hours of operation must not exceed any permit limit. See 45 Fed. Reg. at 52,677, 52,698, 52704-05. EPA recognized as much in 1996, when it proposed to insert "standing alone" at the beginning of the exclusion in a proposed rule. See 61 Fed. Reg. 38,250, 38,254 (July 23, 1996). Adding a condition to a regulation that is not reflected in its text is not "interpretation." It is an attempt to change the rule. See *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000) ("To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").[15]

Moreover, the "standing alone" condition makes no sense, because it implies that *any* change in a unit's hours of operation is a change in the "method of operation" that requires an express exclusion. Utilities change their hours of operation every day in response to demand, to weather, and to myriad other factors. That is not a "change in the method of operation"—it is how industry normally operates. Because

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[15] The United States incorrectly cites a "hypothetical" in the 1980 Preamble as demonstrating the "function" of the hours of operation exclusion. U.S. Br. 23-24 & n.6. In the hypothetical, the change in operating hours triggered PSD *only* because EPA "assum[ed] that the reviewing authority revised [the] permit to reflect" actual emissions before the change—meaning the new operations would exceed the revised permit limit. 45 Fed. Reg. at 52,705. The hypothetical says nothing about whether increased hours of operation within permit limits are ever "major modifications."

changes in hours of operation, standing alone, are not changes in the "method of operation," the "hours of operation" exclusion must do more.

In essence, Petitioners and the United States contend that in changing the "netting" methodology in 1980 EPA fundamentally redefined the "construction" that triggers preconstruction review and radically expanded the reach of the program to existing facilities never before subject to PSD, including under the 1974 and 1978 rules, and the 1979 proposed rules. In the preamble to the 1980 Rules, EPA did *not* say—as it contends now—that changing the netting provisions from "potential" to "actual" emissions would expand NSR applicability to activities at existing units that were not "modifications." To the contrary, EPA's economic analysis concluded that the 1980 "netting" methodology would result in *less* coverage than the 1979 proposal. See 45 Fed. Reg. at 52,729.

Finally, as the *amici curiae* States explain in detail and several courts have observed, EPA's enforcement position has never been the Agency's consistent interpretation of the rules—not even in this very litigation. See Br. States of Alabama *et al.*, at 10-13.[16] The United States concedes that EPA has attempted to interpret the rules to require two different emissions tests at an existing unit: the so-called "actual-to-potential" and "actual-to-projected-actual" tests. U.S. Br. 25 n.8 (suggesting that *which* interpretation is the Agency's true interpretation is not "important"). In fact, EPA advocated both tests at various times in the district court below. See Pet. App. 58a & n.17. This search for a test is the result of EPA's departure from the language of the rules. Indeed, if the 1980

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[16] Courts addressing the "enforcement initiative" have sharply criticized EPA for its inconsistent and result-oriented actions. *See, e.g., Alabama Power*, 372 F. Supp. 2d at 1306-07 (observing that EPA "has not spoken with one voice, or a consistent voice, or even a clear voice, on this issue"); *Ohio Edison*, 276 F. Supp. 2d at 832-33 (describing EPA's administration of NSR as an "abysmal breakdown"); *see also TVA*, 336 F.3d at 1240-41 & n.9, 1245-46, *quoted supra* at n.8.

Rules expanded the construction trigger from "modification" to any project that might affect utilization, then neither the 1992 nor the 2002 rule revisions would have been necessary. See 40 C.F.R. § 51.166(b)(21)(v) (1993) (adopting the optional "actual-to-projected-actual" test for electric generating units); *id.* § 51.166(a)(7)(iv)(c) (2005) (adopting the "actual-to-projected-actual" test for all sources, and establishing a "project[]" as the trigger for that test).

EPA's effort to retroactively "redefine PSD through enforcement actions and litigation" is "not the type of regulatory activity entitled to *Chevron* deference." *Alabama Power*, 372 F. Supp. 2d at 1306. At the least, no deference is due an agency's interpretation that has "fluctuated" in this manner as this "case has progressed." *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 539 n.29 (1982).

III. EPA'S ENFORCEMENT INTERPRETATION IS INCONSISTENT WITH THE ACT.

EPA's enforcement interpretation not only is inconsistent with the 1980 Rules, it also is inconsistent with the CAA itself. The plain text of the CAA requires an NSPS "modification" as the trigger for PSD review. And Congress's clear intention in enacting the 1977 Amendments was to avoid applying PSD to existing sources unless and until a "modification"—the meaning of which was well-established in 1977—occurred.

In the face of this plain language and clear intent, Petitioners and the United States invoke the purported purposes of NSPS and PSD. U.S. Br. 35-50; Pet. Br. 44-48. Even if their articulation of these purposes were correct, a general purpose does not trump statutory language. In the agency's "'anxiety to effectuate the congressional purpose of protecting the public,'" it "'must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). Petitioners and EPA would extend NSR review well beyond the language and clear intent of the statute.

A. Congress's Express Incorporation Of The NSPS Definition Into PSD Means That A PSD "Modification" Requires An NSPS "Modification."

The text of the CAA makes clear that a "modification" for PSD purposes requires a "modification" under NSPS. The statute thus bars EPA's enforcement position, which applies the PSD "major modification" analysis to projects that are not NSPS "modifications." See *Stinson*, 508 U.S. at 45 (no weight can be given to a regulatory interpretation that would "violate the Constitution or a federal statute").

Specifically, the NSR provisions prohibit facilities "on which construction is commenced" from beginning new source "construction" without undergoing pre-construction review and installing state-of-the-art emissions controls. 42 U.S.C. § 7475(a). Recognizing that some changes to existing sources are tantamount to the "construction" of a new source—as it did in enacting NSPS—Congress defined "construction" to include "modifications" to existing sources, as the term "modification" is "defined" and "used" under NSPS. See *id.* § 7479(2)(C) (PSD) ("The term 'construction' when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility."); see also *id.* § 7501(4) ("nonattainment" NSR) (defining "modification" to "mean the same as the term 'modification' as used in section 7411(a)(4)").

By incorporating the NSPS term "modification" and its definition into PSD, Congress limited the scope of "modifications" under PSD to those covered by NSPS. "The substantial relation between the two programs presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (citations omitted). Here, not only did Congress use identical terms in two related parts of the CAA, but the NSR "modification" provisions expressly cross-reference and incorporate the NSPS "modification" provision.

This cross-reference to the existing NSPS provisions makes the presumption of uniform usage irrebutable. See *IBP*, 126 S. Ct. at 523-24 (concluding, in light of one part of a statute's "explicit reference to the use of [an] identical term" from another part of the statute, that "there is no plausible argument that these terms mean something different"). Petitioners' and the United States' contrary argument—that this cross-reference gave EPA discretion to expand the coverage of PSD dramatically beyond NSPS—makes a hash of statutory interpretation.

The United States contends Congress's cross-reference is merely a "shorthand reference [that] is not meaningfully different from a repetition of the Section 7411(a) definition." U.S. Br. 39. But the statute does not merely repeat the NSPS definition in the PSD sections; it defines "modification" for PSD as that term is "defined" and "used" for NSPS. Moreover, where Congress intended to repeat a definition in a separate provision of the Act, it did so. Compare 42 U.S.C. § 7412(a)(3) (defining "stationary source" by reference to the NSPS definition), with § 7412(a)(9) & (10) (repeating verbatim the NSPS definitions of "owner or operator" and "existing source"). Congress's deliberate choice to cross-reference a pre-existing definition as written and used, instead of merely repeating that same definition, must be given effect.

Petitioners' and the United States' attack on *Rowan Cos.* v. *United States*, 452 U.S. 247 (1981), also is wide of the mark. This case does not turn on *Rowan* alone. And *Rowan* simply presents one application of the uncontroversial canon that the same term ordinarily should be given the same meaning throughout a statute. Of course, the Fourth Circuit held that the express statutory cross-reference made that presumption "effectively irrebutable" here. Pet. App. 17a. This Court subsequently reached the same conclusion in *IBP*.

B. The Structure And Context Of The CAA Confirm That A PSD "Modification" Requires An NSPS "Modification."

When Congress enacted the 1977 PSD program, it did not write on a clean slate. The regulatory PSD program had been in existence since 1974. And Congress incorporated specific provisions of that program (including "modification" in § 52.01(d)) and rejected or "tightened" others (including "BACT" in § 52.01(f)). *Alabama Power*, 636 F.2d at 349-50. This selectivity shows that incorporation, where it occurred, was deliberate. See *Lorillard*, 434 U.S. at 582 ("This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices [into the ADEA] strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA [into the ADEA]."). Moreover, use of the pre-existing term "modification" "carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." *Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998); see also *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184, 193-94 (2002).

Congress's awareness of and attention to the details of the pre-existing regulatory PSD program are clear from the face of the statute. As an initial matter, recognizing that it would take some time before new PSD rules would be promulgated and adopted into the SIPs, Congress instructed that the bulk of the pre-existing rules "shall remain in effect" and amended other provisions. See 42 U.S.C. § 7478(a). Moreover, where Congress intended the new PSD rules to differ from the existing NSPS and regulatory PSD, it said so. For example, Congress enacted a new definition of the term "commenced" and a new and more stringent BACT requirement. See *id.* §§ 7479(2)(A) (defining "commenced" differently than the pre-existing rules), 7479(3) (providing that BACT must be at least as stringent as the applicable NSPS, while the pre-existing PSD rules equated BACT with NSPS).

By contrast, Congress made no change in the existing definition of "modification." Not only did the 1977 Amendments leave that definition untouched, Congress expressly incorporated the NSPS definition and usage of modification into the NSR statutory programs. *Id.* §§ 7479(2)(C), 7501(4); see also 123 Cong. Rec. at 36,331. This is not the mere, mindless "re-enactment" of a pre-existing statutory provision, as the United States asserts. It reflects the conscious adoption and careful incorporation of that provision's pre-existing meaning.

Notably absent from the language and history of the statute is any suggestion that Congress intended or expected PSD to apply to a far broader category of existing sources than NSPS did, which would be the case under Petitioners' and the United States' reading. Neither agencies nor courts should presume that Congress authorizes weighty or wide-ranging changes through statutory language that strongly suggests stability. See, *e.g.*, *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160 ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); *Chisom* v. *Roemer*, 501 U.S. 380, 396 & n.23 (1991) ("[I]f Congress had such an intent, [it] would have made it explicit in the statute ...."). Simply put, if Congress in 1977 intended to expand PSD to tens of thousands of projects at existing power plants that neither NSPS nor regulatory PSD then reached, Congress would have said so in unmistakable terms, not by a technical and conforming amendment. There is not a word in the statute suggesting that Congress intended such a revolution—as EPA itself has conceded. See 49 Fed. Reg. at 43,213 ("If Congress had intended a change as to modifications [when it created NSR] it probably would have said so explicitly, yet it said nothing.").

The legislative history also confirms Congress's clear intent to limit the application of PSD to new and expanded sources, just as under NSPS. Congress consistently expressed its intention not to impose the cost of retrofitting new PSD controls

on existing units that simply maintain their capabilities, while ensuring that newly constructed or expanded units installed the best available controls. See, *e.g.*, H.R. Rep. No. 95-294, at 185 ("Building control technology into new plants at time of construction will plainly be less costly than requiring retrofit when pollution ceilings are reached."). Thus, the sponsor of the Senate bill stated that PSD would "apply only to new major emitting facilities and do not affect existing facilities." 123 Cong. Rec. 18,021 (1977) (Sen. Muskie).

Nothing in the legislative record suggests that Congress intended to extend PSD to existing sources that merely maintain their capacity. "[I]t tests the limits of reason to suggest that despite such silence, Members of Congress voting for those amendments intended to enact what would arguably be the single most significant change in" the application of PSD to existing sources. *Department of Commerce* v. *United States House of Reps.*, 525 U.S. 316, 342-43 (1999); see also *Chisom*, 501 U.S. at 396 & n.23 ("[I]f Congress had such an intent ... at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history ...."). In short, the PSD provisions reflect a congressional policy choice "not ... to cut back on emissions from existing major stationary sources through limitations on their productive capacity, but rather to ensure that they will install state-of-the-art pollution controls at a juncture where it otherwise makes [economic] sense to do so." 70 Fed. Reg. at 61,088. To effectuate this policy judgment, Congress directed EPA not to apply PSD to existing facilities, "since they and their emissions capacity are 'grandfathered.'" H.R. Rep. No. 95-294, at 144.

Other provisions of the statute further demonstrate that EPA's enforcement interpretation is wrong. Under the enforcement interpretation, PSD's BACT requirement would unavoidably be triggered, repeatedly, during the life of any industrial facility. However, as EPA has observed, an interpretation of the modification provision under which "all ma-

jor facilities eventually trigger NSR.... cannot be squared with the plain language of the CAA." 68 Fed. Reg. at 61,273. In particular, the imposition of BACT requirements at every electric utility would override the Acid Rain Program's flexible cap-and-trade mechanism.[17] Subsequent market-based regulatory provisions—specifically, the NO_x SIP Call, CAIR, and regional haze program[18]—are similarly premised on the expectation that existing coal-fired utility boilers will operate into the future without triggering PSD.

C. The "Purposes" Of PSD And NSPS Do Not Support EPA's Enforcement Interpretation.

The United States and Petitioners ultimately invoke the "purposes" of NSPS and PSD to argue that PSD can (as the United States claims) or must (as Petitioners claim) cover maintenance activities that allow an existing facility to continue operating as constructed and permitted to operate—thus expanding PSD coverage far beyond any activity that is a "modification" under NSPS and the statute. Cf. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997). They are incorrect.

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[17] Petitioners suggest that Congress's failure in 1990 to enact "proposals to amend the Act's PSD provisions to exclude modernization projects like the one at issue in *WEPCo*," means Congress intended NSR to apply broadly to existing utility boilers. *See* Pet. Br. 15. The courts repeatedly have declined to search for a prior Congress's intent in a later Congress's failure to enact proposed legislation. *See SWANCC*, 531 U.S. at 170-71; *Pension Benefit Guar. Corp.* v. *LTV Corp*, 496 U.S. 633, 650 (1990).

[18] CAIR establishes a cap-and-trade program to address transport of pollution in the eastern United States. 70 Fed. Reg. 25,162 (May 12, 2005). *See also* E.P.A., *Basic Facts On CAIR*, *at* http://www.epa.gov/cair/basic.html (last visited Aug. 6, 2006). The regional haze program establishes visibility protection for national parks and other areas, 42 U.S.C. §§ 7491, 7492, and its regulations require power plants to install Best Available Retrofit Technology ("BART"). *See* E.P.A., *Fact Sheet - Final Amendments to the Regional Haze Rule and Guidelines for Best Available Retrofit Technology (BART) Determinations*, *available at* http://www.epa.gov/visibility/fs_2005_6_15.html (last visited Aug. 6, 2006).

To the extent the United States and Petitioners rely on the remedial purposes of PSD, they improperly are elevating one statutory purpose over all others. Like most legislation, PSD is a compromise among purposes: "to protect public health and welfare from any actual or potential adverse effect" of air pollutants and "to insure that economic growth will occur ... consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(1), (3); see also 123 Cong. Rec. 26,841 (1977) (Sen. Muskie) ("[T]he conference agreement on the Clean Air Act ... is a compromise in every sense of the term."). It is wrong to use one of these purposes to override the Act's plain language. "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-26 (1987).

Of course, some PSD provisions are more stringent than the NSPS provisions, as Petitioners repeatedly note. But the statute specifies exactly *how* PSD should apply more stringently. PSD applies to more pollutants and more source categories than NSPS. And when a source triggers PSD, it must comply with the complicated PSD pre-construction permitting process and install BACT, which may be more stringent than the "applicable [NSPS]." 42 U.S.C. § 7479(3). These provisions reflect Congress's judgment as to the manner in which to tighten NSPS—and they do not include the radical expansion of the "modification" concept that Petitioners and the United States advocate here.[19]

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[19] The principal decisions that Petitioners and the United States rely upon reflect instances where Congress has adopted a specific requirement for PSD—for example, the different statutory definitions of "source" and of "commenced." *See* Pet. App. 16a-18a (discussing *Potomac Elec. Power Co.* v. *EPA*, 650 F.2d 509 (4th Cir. 1981) and *Northern Plains Res. Council* v. *EPA*, 645 F.2d 1349 (9th Cir. 1981)); *id.* at 64a-67a (discussing *Alabama Power* and *Northern Plains*). They do not stand for the proposi-

Petitioners' and the United States' further descriptions of the differing purposes of NSPS (as a "technology-based" program) and PSD (as an "ambient air quality" program) also are misguided. Both NSPS and PSD protect ambient air quality, and both NSPS and PSD regulate emissions "output" through technological requirements. As EPA has explained, "the decision to develop the NSPS is clearly based on ambient air quality concerns," 45 Fed. Reg. at 52,692—specifically, the need to protect the NAAQS, which are "ambient" air quality standards. And, as the BACT provisions make clear, PSD imposes technology-based controls, regardless of whether such level of control is actually needed to protect air quality. See 42 U.S.C. § 7479(3).[20]

Construing the 1980 Rules so that PSD is triggered only if there is NSPS modification activity at an existing unit, and then only if the source-wide emissions exceed a *de minimis* threshold, effectuates both the technology and air quality purposes of PSD. However, this is the result of different definitions of "source," not "modification," under NSR and NSPS. And it is implemented through the regulatory concept of "major modification," which *narrows* the universe of activities subject to the more stringent technology requirements of PSD by limiting PSD applicability to "modifications" that might have "major" impacts on air quality.

Petitioners also argue that pre-construction permit coverage must include activities that consume the PSD "increment[s]." Pet. Br. 40-41. This argument "conflates the different yet complementary functions of [pre-construction] review and calculation of increment consumption." *Alabama Power*, 636 F.2d at 378. The statute and rules provide the remedy for increment consumption, which is the requirement that States

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tion that differences in NSPS and PSD alone justify departing from consistent statutory language.

[20] The Seventh Circuit's statement that PSD limits "output (pollution)," while the NSPS limits "inputs (technology)" is simply wrong. *Cinergy*, 458 F.3d at 711.

must review air quality and take "corrective action" if the increments are exceeded. See 45 Fed. Reg. at 52,677; 40 C.F.R. § 51.166(a)(3)-(4). It is not the expansion of the "modification" provision. Indeed, PSD has never covered all activities that affect ambient air quality or potentially consume increment. For example, it does not cover "non-modification" activity (*e.g.*, a fuel switch or increases in operating hours allowed by permit), and it does not cover the construction of sources that are not "'major emitting facilit[ies].'" 42 U.S.C. § 7479(1). Under Petitioners' reasoning, each of the PSD rules' exclusions would be improper, as each involves activity that potentially consumes increment but is not subject to pre-construction review. This cannot be correct.

* * * *

In the end, Petitioners' and the United States' arguments do not comport with longstanding law and policy or common sense. For 35 years, and at the time Congress enacted the 1977 Amendments, the NSPS rules provided that a "modification" occurs if and only if a project will convert an existing source into a "new source," by increasing the emission rate. This requirement was incorporated into the subsequent regulatory and statutory PSD programs. EPA is not free to interpret its rules in this enforcement action to abandon the "modification" requirement and radically and retroactively expand the scope of the rules.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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